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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

PLAINTIFFS' TRIAL BRIEF

[D.Ak. L.R. 39.2]

PLAINTIFFS' TRIAL BRIEF

1 **I. INTRODUCTION**

2 As this Court well knows, this is a Clean Water Act enforcement action by residents of the
 3 Native Village of Kivalina against the world's largest zinc and lead mine, the Red Dog mine
 4 operated by Teck Cominco Alaska Incorporated. This dispute first began in 2002 in *Kivalina*
 5 *Relocation Planning Commission v. Teck Cominco Alaska, Incorporated*, A02-231-CV (JWS)
 6 (the "KRPC case"), has continued across four years in its present incarnation, and is now ready for
 7 trial. Teck Cominco's admitted violations are well documented, and it is time for it to face both
 8 liability and significant penalties for its years of illegal behavior.

9 This trial brief follows the dictates of this Court's Order at Docket 177 and also Local Rule
 10 39.2, in giving a short statement of Adams's position supported with authority, designating
 11 pleadings and identifying the remaining claims. It addresses the issues expected at both the liability
 12 and penalty phases of trial.

13 **II. SUMMARY OF BRIEF**

14 This citizens' suit enforcement case relies on Teck Cominco's admissions to the United
 15 States Environmental Protection Agency ("EPA") to demonstrate that Teck Cominco violated its
 16 Clean Water Act permit more than 2400 times. Adams's Supplemental Revised Complaint [Docket
 17 183] includes 10 claims covering a variety of violations, as summarized in Table I.¹ Adams has
 18 proven 621 violations [Docket 136], the Court has dismissed 54 violations [Docket 127], and
 19 Adams has previously withdrawn several violations [Docket 127]. Through this brief Adams
 20 withdraws the remaining monitoring and reporting violations alleged in its third, sixth and ninth
 21 claims, as well as the remaining violations in its fourth, fifth and tenth claims (396 withdrawn
 22 violations total), which should streamline trial. For proof at trial there remain 992 total dissolved
 23 solids ("TDS") violations in the first claim, 622 cyanide violations in the second claim, and 208
 24 whole effluent toxicity ("WET") violations in the third claim, totaling 1822 violations.

25
 26 ¹Per D.Ak.L.R. 39.2(b)(1)[A], the plaintiffs in this case – Enoch Adams, Jr., Leroy Adams,
 27 Andrew Koenig, Jerry Norton and Joseph Swan, Sr., collectively "Adams" – are all subsistence
 28 hunters and fishers and long-time residents of the Native Village of Kivalina (plaintiff David Swan
 passed away on May 5, 2005). The defendant is Teck Cominco Alaska Incorporated, the operator
 of the Red Dog Mine upstream of Kivalina. The NANA Regional Corporation intervened as a
 defendant, and the Northwest Arctic Borough intervened as a defendant in the penalty phase.

TABLE I: Summary of Adams's Claims

Claim/ Violation	Proven	Dismissed	Withdrawn	For Trial
FIRST CLAIM				
TDS Daily	618			301
TDS Monthly				691
SECOND CLAIM				
Cyanide Daily			1	34
Cyanide Monthly				588
THIRD CLAIM				
WET Reporting			7	
WET Daily				11
WET Monthly				199
FOURTH CLAIM				
Cadmium Daily			2	
Cadmium Monthly			38	
FIFTH CLAIM				
Unpermitted Discharge			3	
SIXTH CLAIM				
Mine Monitoring & Reporting		20	276	
SEVENTH CLAIM				
Unpermitted Discharges - Port	2			
EIGHTH CLAIM				
Port TSS	1			
NINTH CLAIM				
Port Monitoring & Reporting		20	19	
TENTH CLAIM				
COBC		14	50	
Total	621	54	396	1822

1 Under the Clean Water Act, there are two stages to this litigation: the liability phase and the
2 penalty phase. At the liability stage, Adams's theory of the case is simple: Teck Cominco has a
3 permit from EPA requiring its discharge of mine effluent to meet certain numerical limitations; over
4 the past 10 years it has routinely filed reports with EPA documenting its failure to meet those
5 numerical limitations. Teck Cominco has admitted and documented the 1822 violations remaining
6 for trial in filings with the EPA, and a great number of them in its Answers here and in the *KRPC*
7 case. At trial these violations will be proven through a variety of documentary evidence: Teck
8 Cominco's Discharge Monitoring Reports (DMRs), laboratory reports, court filings, and other
9 correspondence. The three central legal/factual questions to be resolved at this stage are 1) what are
10 the permit limitations applicable to each parameter? 2) Has Teck Cominco violated those permit
11 limitations? And 3) is that violation ongoing or capable of repetition?

12 Teck Cominco's anticipated defenses to liability include 1) the split sample defense rejected
13 by this Court on two previous occasions (Dockets 104 and 276); 2) factually challenging certain
14 violations; 3) challenging its permit limitation for monthly cyanide; and 4) asserting that the
15 violations are not ongoing or capable of repetition.

16 At the penalty stage, Adams will demonstrate the six Clean Water Act penalty factors
17 require a significant fine, near the maximum of \$70,370,000 for the 2,456 violations that Adams
18 will ultimately prove. It will demonstrate the violations were serious and continuous across 10
19 years, that Teck Cominco had significant economic benefit by not complying, that these violations
20 are part of a long history of violations by the mine, that Teck Cominco did not in good faith attempt
21 to remedy the violations or mitigate its impact on spawning fish, that a significant penalty is
22 necessary for deterrence given Teck Cominco's gigantic profits, and that justice requires that Teck
23 Cominco's flouting of the law be halted. 33 U.S.C. § 1319(d). Beyond a significant fine, however,
24 there is also a need for injunctive relief to remedy Teck Cominco's violations.

25 Teck Cominco's anticipated defenses at the penalty phase include 1) its assertion that it had
26 little economic benefit from its violations; 2) that the violations were not serious and did not harm
27 wildlife; 3) that it acted in good faith; and 4) that regulatory agencies signed off on its violations of
28 its permit.

1 III. DESIGNATION OF PLEADINGS (D.Ak. L.R. 39.2(b)(2))

2 The pleadings Adams expects to rely on include the Complaint (Docket 1), Answer (Docket
3 6), Supplemental Revised Complaint (Docket 183) and Answer to Supplemental Revised Complaint
4 (Docket 184). In addition, Adams expects to rely on the Complaint (Docket 1) and Teck Cominco's
5 Answer (Docket 7) in the *KRPC* case.

6 Relevant pre-trial rulings include this Court's rulings on various summary judgment motions
7 at Dockets 127, 136 and 276. Further relevant pre-trial rulings include those at Dockets 302, 303.
8 The stipulated Uncontested Facts are found at Docket 196. In addition, Adams will rely on
9 admissions made by Teck Cominco in its summary judgment pleadings.

10 IV. REMAINING CLAIMS (D.Ak. L.R. 39.2(b)(3))

11 As set forth in Table I above, the violations remaining for proof at trial include 992
12 violations of Teck Cominco's TDS permit limits (first claim), 622 violations of its cyanide permit
13 limits (second claim), and 208 violations of its WET permit limits (third claim). A total of 1822
14 violations in these three claims are the claims Adams will prove at trial.² As noted above in Section
15 II, Adams is withdrawing a subset of its original claims. The threshold the Court set for proving
16 ongoing violations in the monitoring and reporting context – violations of the same parameter at the
17 same location – has not been met and thus Adams is withdrawing the 276 monitoring and reporting
18 violations in its sixth claim, the 19 in its ninth claim and the seven in its third claim. In addition, as
19 there was no Compliance Order by Consent ("COBC") for the 2007 discharge season, and the 2004,
20 2005 and 2006 COBCs had shifting requirements, Adams is unable to show the documented
21 violations of the 1999-2003 COBCs are ongoing and is thus withdrawing those 50 violations in its
22 tenth claim. Further, Adams is withdrawing the cadmium claims in its fourth claim and the
23 unpermitted discharge claims in its fifth claim as they are not, to Adams knowledge, ongoing. The
24 withdrawal of these claims will streamline the trial and focus it on the three major sets of violations,
25

26 ²In totaling the number of violations here, and in Tables I and II, Adams follows this Court's
27 adoption of the holding of *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304,
28 313-15 (4th Cir. 1986), *vacated and remanded on other grounds*, 484 U.S. 49 (1987) that
violations of a monthly average permit limitation mean a violation on each day of that month the
facility discharged. Docket 276 at 5.

1 of TDS, cyanide and WET permit limits.

2 Below, Adams sets forth its case at the liability and penalties phases of this case.

3 **LIABILITY PHASE**

4 **V. PLAINTIFFS WILL PROVE THE REMAINING TDS, CYANIDE AND WHOLE 5 EFFLUENT TOXICITY VIOLATIONS DURING THE LIABILITY PHASE.**

6 The three remaining claims cover violations of Teck Cominco's TDS, cyanide and whole
7 effluent toxicity permit limitations. The evidence of liability, all provided by Teck Cominco, is
8 overwhelming. The few issues as to liability – permit limits, violations and whether or not they are
9 ongoing – should be relatively easy to resolve given the evidence.

10 **A. The evidence of liability is overwhelming.**

11 The evidence of liability for each category of claims is similar: first, Teck Cominco has
12 admitted a great number of the violations in its Answers and other filings in this case and the *KRPC*
13 case. Second, Teck Cominco has admitted the remaining violations in its DMRs, backed up by the
14 laboratory reports underlying those DMRs. Third, Teck Cominco has further admitted certain
15 violations in notices of permit violations submitted to the EPA. Fourth, Teck Cominco has admitted
16 certain violations in its Compliance Orders by Consent with the EPA. Finally, Teck Cominco's staff
17 have admitted certain violations in their deposition testimony. The documentary evidence of these
18 violations will be presented through expert witnesses, the plaintiffs themselves (elected officials and
19 former elected officials in Kivalina), and Teck Cominco employees.

20 **B. The issues at trial on liability are easy to resolve.**

21 There are three basic issues to be decided during the liability phase: what are the permit
22 limits, did Teck Cominco violate them, and are those violations ongoing or capable of repetition?

23 **1. What are the permit limits?**

24 For two of the three parameters at issue – TDS and cyanide – there may be legal skirmishes
25 as to what permit limits apply. On TDS, there should not be a dispute because of the Court's recent
26 summary judgment ruling (Docket 276 at 3), but one may still arise given Teck Cominco's position
27 in summary judgment briefing. It is Adams's position that the permit limits in the 1998 mine permit
28 for both monthly average TDS (170 mg/L) and daily maximum TDS (196 mg/L) apply through
June 15, 2004, when the EPA Appeals Board issued its decision on an appeal of Teck Cominco's

1 2003 permit modification. After June 15, 2004, the permit limits for both monthly and daily TDS
2 from the 1998 permit apply only during Arctic grayling season, a period in late May and/or early
3 June each year; at other times the limitation in the 2003 permit modification (3900 mg/L daily
4 maximum, no monthly average limit) applies. The potential dispute may arise because Teck
5 Cominco has recently made an argument, for the first time, that the monthly TDS permit limitation
6 does not apply at any time. Docket 257 at 6-9. As Adams explained in plaintiffs' summary
7 judgment reply, this argument contradicts its own deposition testimony and representations to and by
8 the EPA in its COBCs. Docket 270 at 7-9. This Court appears to have rejected Teck Cominco's
9 argument in ruling for Adams on the monthly TDS summary judgment question, Docket 276 at 3,
10 but Teck Cominco may still argue that there is no longer a monthly TDS permit limit. Adams
11 incorporates its earlier argument, Docket 270 at 7-9, if this is the case.

12 The other legal issue – what is the monthly cyanide permit limit Teck Cominco must meet?
13 – was also raised in Adams's recent summary judgment motion, but not decided by the Court.
14 Adams set forth plaintiffs' position in its opening and reply briefs (Dockets 241 at 4-12, 270 at 9-
15 13), and incorporates those arguments here. At trial, Adams's experts will explain that (contrary to
16 the Court's implication in Docket 276 at 3) there currently exist methodologies that can detect
17 cyanide below 9 µg/L, that those methodologies are required by the permit and that they are
18 currently employed by Teck Cominco in its total cyanide testing. It is based on those methodologies
19 that Teck Cominco has been, for years, reporting values in excess of the permit limit (4 µg/L) but
20 below the interim minimum limit (9 µg/L) found in a different permit condition. The confusion
21 arises in parsing the permit because although the methodologies exist, the methodologies are
22 required by the permit, and Teck Cominco is using them, they are not yet officially "*EPA-*
23 *approved.*" This does not mean that EPA does not know of them or approve of their use by Teck
24 Cominco; indeed, it *required* their use in setting the permit condition at 4 µg/L and requiring Teck
25 Cominco to achieve a method detection limit of 3 µg/L (Permit Condition I.A.5.b, Trial Exhibit
26 3000 at 5-6). The factual elucidation of existing and in-use methodologies will inform the Court's
27 understanding of the legal requirements of the permit regarding monthly cyanide limits. All of the
28 permit's conditions must be read together, including the 4 µg/L limit, and the requirement (at

1 Condition I.A.5.b) that Teck Cominco achieve a method detection limit of 3 µg/L. Trial Exhibit
 2 3000, at 5-6. Teck Cominco has complied with the requirement to achieve a method detection limit
 3 of 3 µg/L, and the total cyanide tests under that methodology reveal repeated violations of it permit
 4 limit of 4 µg/L.

5 The WET permit limits should not be in dispute.

6 **2. Did Teck Cominco violate those permit limits?**

7 Teck Cominco has admitted a substantial proportion of the violations remaining for trial,
 8 and the remaining violations will be proven using the evidence summarized in Section V.A, above.

9 **3. Are the violations ongoing or capable of repetition?**

10 The central question at the liability phase is going to be, are the permit violations of TDS,
 11 cyanide and WET ongoing or capable of repetition? This was the reason that the Court declined to
 12 enter summary judgment on many of Adams's claims, despite Teck Cominco's admissions of
 13 violations. Docket 136. Adams will demonstrate at trial that each of the six types of violations –
 14 daily and monthly TDS, daily and monthly cyanide, and daily and monthly WET – have occurred
 15 since this suit was filed in March 2004. This meets the test in the Ninth Circuit: "If the same
 16 parameter is exceeded [after the Complaint is filed] . . . then the violation will be deemed 'ongoing'
 17 and liability will attach." *Sierra Club v. Union Oil Co. of Cal.*, 716 F. Supp. 429, 433 (N.D. Cal.
 18 1988).

19 **C. Known evidentiary issues (D.Ak. L.R. 39.2(b)(7))**

20 Adams expects that most of the evidentiary issues – raised in the motions in limine – will be
 21 resolved by the time of trial. Adams expects Teck Cominco to challenge Adams's experts in various
 22 ways. Because Teck Cominco did not file any motions challenging Adams's witness list or those
 23 listed on it by the objection date set by the Court, it should be estopped from objecting to those
 24 experts at a later date. (Adams anticipates that the evidentiary issues at the liability phase, if any,
 25 will be similar to those at the penalty phase, and so does not independently address them in
 26 discussing the penalty phase, below.)
 27
 28

PENALTY PHASE

VI. TECK COMINCO’S ONGOING, SERIOUS VIOLATIONS OF THE CLEAN WATER ACT REQUIRE A SIGNIFICANT PENALTY TO CAPTURE THE ECONOMIC BENEFIT IT HAS ACQUIRED AND DETER FUTURE ILLEGAL BEHAVIOR.

At the penalty phase, Adams will demonstrate the six Clean Water Act penalty factors require a significant fine, near the maximum of \$70,370,000 for the 2,456 violations that Adams will ultimately prove. For each of the violations in the claims summarized above, the penalty assessment is similar in approach, as outlined below. The penalty assessment is governed by 33 U.S.C. § 1319(d), which requires a mandatory penalty once liability is found: any person who violates the Act “*shall be subject to a civil penalty not to exceed \$25,000 per day for each violation.*” 33 U.S.C. § 1319(d) (emphasis added); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) (civil penalties under Clean Water Act are mandatory, not discretionary). EPA has increased the maximum penalty amount: the penalty is \$27,500 per day for each violation occurring after January 30, 1997 and through March 15, 2004, and \$32,500 per day for each violation after March 15, 2004. 40 C.F.R. § 19.4. The maximum penalties for the violations Adams will prove at trial are summarized in Table II below, and Adams will request that the maximum penalty be imposed.

The Supreme Court has clarified that economic gain and restoration of the status quo are not the only bases on which penalties should be awarded under the Clean Water Act. *Tull v. United States*, 481 U.S. 412, 422 (1987) (explaining that civil penalties imposed are not to be “calculated solely on the basis of equitable determinations, such as the profits gained from violations of the [Clean Water Act]”). Instead, Clean Water Act penalties are “intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo[.]” *Id.*; see also *Atlantic States Legal Found. Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) (“*Tyson Foods*”) (“penalties are designed to punish violators for their non-compliance and to serve the goal of retribution”); *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1244 (N.D. Ind. 1989) (“A civil penalty must provide a meaningful deterrence without being overly punitive; it should be large enough to hurt; it should deter anyone in the future from showing a similar lack of concern with compliance.”). Because Teck Cominco has flouted its

1 permit limits for a decade, accruing thousands of permit violations, a severe penalty is warranted not
 2 only for punishment, but to deter it and similarly situated mines from committing Clean Water Act
 3 violations in the future.

4
 5
 6 **TABLE II: Maximum Penalties for Teck Cominco's Violations**

7 Parameter	8 Number of Violations pre March 15, 2004	9 Number of Violations post March 15, 2004	10 Penalty per Violation (\$)	11 Total Penalty (\$)
12 TDS daily	618*		27,500	16,995,000
		301	32,500	9,782,500
11 TDS monthly	618		27,500	16,995,000
		73	32,500	2,372,500
13 Cyanide daily	24		27,500	660,000
		10	32,500	325,000
14 Cyanide monthly	418		27,500	11,495,000
		181	32,500	5,882,500
16 WET daily	10		27,500	275,000
		1	32,500	32,500
18 WET monthly	199		27,500	5,472,500
19 Unpermitted Discharge to Tundra	2*		27,500	55,000
21 Port TSS	1*		27,500	27,500
22 Total	1,890	566		\$70,370,000

23 *Violations already established at summary judgment, Docket 136.

24
 25 Courts follow a two-step process in calculating penalties under section 1319 of the Clean
 26 Water Act. *See Tyson Foods, Inc.*, 897 F.2d at 1142. First, the court calculates the maximum
 27 penalty that could be assessed against the violator. *Id.* Second, the court determines if the
 28

1 maximum penalty should be reduced based upon an analysis of six factors in section 1319(d). *Id.*³
 2 Those factors are “the seriousness of the violation or violations, the economic benefit (if any)
 3 resulting from the violation, any history of such violations, any good-faith efforts to comply with the
 4 applicable requirements, the economic impact of the penalty on the violator, and such other matters
 5 as justice may require.” 33 U.S.C. § 1319(d). If the court chooses not to impose the maximum
 6 penalty, “it must reduce the fine in accordance with the factors spelled out in section 1319(d);
 7 clearly indicating the weight it gives to each of the factors and the factual findings that support its
 8 conclusion.” *Tyson Foods, Inc.*, 897 F.2d at 1142.

9 **A. Teck Cominco’s violations here are serious.**

10 In evaluating the seriousness of the violations, it is appropriate to consider the number,
 11 duration and degree of the violations, as well as the actual or potential harm to human health and the
 12 environment. *Hawaii’s Thousand Friends*, 821 F. Supp. at 1383. The Court may justifiably
 13 impose a significant penalty if it finds there is a risk or potential risk of environmental harm from the
 14 violations, even absent proof of actual deleterious effect. *United States v. Smithfield Foods*, 972 F.
 15 Supp. 338, 344 (E.D. Va. 1997); *United States v. The Municipal Authority of Union Township*,
 16 929 F. Supp. 800, 807 (M.D. Pa. 1996), *aff’d* 150 F.3d 259, 264 (3rd Cir. 1998) (“*Municipal*
 17 *Township II*”) (“because actual harm to the environment is by nature difficult and sometimes
 18 impossible to demonstrate, it need not be proven to establish that substantial penalties are
 19 appropriate in a Clean Water Act case”).

22 ³This is commonly known as the “top-down” approach. Some courts apply the “bottom-up”
 23 approach, in which the economic benefit of noncompliance with the Act is calculated in the first step,
 24 and then adjusted either up or down based on the statutory factors in section 1319(d). *See*,
 25 *e.g.*, *United States v. The Municipal Authority of Union Township*, 150 F.3d 259, 265-66 (3rd Cir.
 26 1998) (“*Municipal Township II*”). There appears to be some judicial preference for the “top-down”
 27 penalty calculation method, however, and that approach has been applied in this circuit. *See*
 28 *Hawaii’s Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw.
 1993); *see, e.g. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 574-76
 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996); *Public Interest Research Group of New Jersey, Inc.*
v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109
 (1991); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir.
 1990).

One indicator of the seriousness of particular violations is the degree to which the discharge violations exceeded effluent limitations or water quality standards. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1161, 1163, 1166 (D. N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64, 79 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (“*Powell Duffryn*”). Here, the evidence at trial will show that Teck Cominco’s TDS daily maximum and monthly average discharge routinely and for many years exceeded its permit limit *by a factor of 20*, meeting the threshold of serious violation.

Along with the magnitude of water quality violations, the risk of impacts to aquatic ecosystems and public health also attest to the seriousness of defendants’ discharges. The evidence at trial will show that although the EPA set permit levels to be protective of Arctic grayling spawning, Teck Cominco did not change its discharge in any way during grayling spawning season but continued “business as usual” with high TDS discharges.

Teck Cominco’s discharge violations clearly meet the criteria to be considered “serious” for the purposes of assessing civil penalties, and thus does not justify any reduction from the statutory maximum penalty.

B. Teck Cominco achieved significant economic benefit by not complying with its permit.

The “economic benefit” factor has been described as the “after-tax present value of avoided or delayed expenditures,” *Municipal Township II*, 150 F.3d at 264 (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 481 (D.S.C. 1995)), and the “amount of money a company has gained over its competitors by failing to comply with the law.” *Smithfield Foods*, 972 F. Supp. at 348. As the Court explained in *Smithfield Foods*, “[w]hen a company delays or avoids certain costs of capital and operations and maintenance necessary for compliance, the company is able to use those funds for other income-producing activities, such as investing that money in their own company.” *Id.* at 349.

As summarized by another District Court:

An integral part of an economic benefit calculation is a “present value analysis” of compliance costs based on dates, rates and amounts. Present value is a common economic term that refers to a stream of future cash flows expressed as a single current dollar amount. The purpose of the analysis is to compare the present dollar value of [a party’s] delayed compliance costs with the present dollar value of the [party’s] costs had it completed and

1 begun operating necessary pollution control equipment in a timely manner.
 2 *Hawaii's Thousand Friends*, 821 F. Supp. at 1387. A violator's economic benefit under the Clean
 3 Water Act is often difficult to accurately determine. A reasonable approximation of economic
 4 benefit, however, is sufficient to meet the plaintiff's burden for this factor. *Powell Duffryn*, 913
 5 F.2d at 80.

6 At trial, plaintiffs' expert economist Dr. Michael Kavanaugh will demonstrate that Teck
 7 Cominco achieved a significant economic benefit – more than \$25,000,000 – by not investing in the
 8 technology necessary to bring its discharges into line with its permit limitations. However, for the
 9 purposes of assessing Clean Water Act penalties using the “top-down” method of calculation, the
 10 exact amount of economic benefit is not important. As long as defendants gained *some* economic
 11 benefit under this factor – as will be demonstrated at trial – reduction of the statutory maximum
 12 penalty amount is not appropriate.

13 **C. Teck Cominco has a Long History of Violations**

14 In determining the “history of such violations,” courts consider the duration of a defendant's
 15 current violations, whether the defendant has committed similar violations in the past, and the
 16 duration and nature of all of the violations, including whether the violations are perpetual or
 17 sporadic. *Gulf Park Water*, 14 F. Supp. 2d 854, 864 (S.D. Miss. 1998) (*citing Smithfield Foods*,
 18 972 F. Supp. at 349). In doing so, the court may weigh *all* of a defendant's violations in the record,
 19 not just those for which liability has been determined. *Municipal Township II*, 929 F. Supp. at
 20 807.

21 In this case, the violations that will be proven at trial span an eight-year period from 1999 to
 22 2007, a significant duration; the violations actually began earlier, as alleged in the *KRPC* suit, but
 23 the earlier violations could not be pursued in this suit because of the five-year statute of limitations.
 24 In addition to the violations alleged in this suit and the *KRPC* suit, and violations documented in
 25 Adams's and *KRPC*'s notice letters but not part of either lawsuit because they were not ongoing,
 26 Adams will offer evidence of other, similar violations by Teck Cominco as memorialized in the
 27 Consent Decree in *United States v. Cominco Alaska, Inc.*, No. A97-267-CIV (JKS) and other
 28 settlements involving Teck Cominco, the EPA and the state Department of Environmental

1 Conservation. The sheer magnitude of the violations here – almost 2500 – plus the thousands of
 2 other violations documented but not alleged in this suit, in addition to the violations shown in
 3 enforcement actions by federal and state agencies, demonstrate that no reduction of the maximum
 4 penalty is warranted for the history of Teck Cominco's violations.

5 **D. Teck Cominco has never made a good faith effort to comply with its TDS**
 6 **permit limit.**

7 Adams will demonstrate through documentary evidence and expert testimony that Teck
 8 Cominco did not ever make a good faith effort to comply with its TDS permit limits, instead
 9 pursuing solely a regulatory strategy that to date has not produced compliance, a decade after its
 10 permit first included TDS limits. The lack of good faith on Teck Cominco's part does not justify
 11 any reduction in the maximum penalty.

12 **E. Teck Cominco's massive profits demonstrate that it can absorb a significant**
 13 **penalty.**

14 Penalties are not limited to the economic benefit derived from noncompliance, otherwise a
 15 penalty would make the violator no worse off than complying in a timely manner. *Tull*, 481 U.S. at
 16 422-23 (economic gain and restoration of the status quo are not the only bases on which penalties
 17 should be awarded under the Clean Water Act; penalties are designed to punish violators for their
 18 noncompliance and to serve the goals of retribution and deterrence). One of the primary purposes of
 19 civil penalties is to deter the violator and others from committing future violations. *Id.*

20 Under section 1319 of the Act, the court is required to consider the economic impact of the
 21 penalty on the violator. In doing so, the court may consider appropriate economic indicators of a
 22 company's financial status. *Smithfield Foods*, 972 F. Supp. at 353. To deter future violations by
 23 Teck Cominco Alaska and other similarly situated mines in Alaska, the Court should impose a
 24 penalty that is significant relative to the company's financial resources. The size of Teck Cominco's
 25 business and its annual revenues warrant the imposition of the maximum penalty. At trial, Adams's
 26 expert Dr. Michael Kavanaugh will demonstrate that Teck Cominco has the ability to pay a
 27 significant penalty.

28 **F. Justice requires the imposition of the maximum penalty to deter Teck**
Cominco and others from violating the Clean Water Act.

Not only do all of the Clean Water Act section 1319 factors weigh in favor of imposing the

1 maximum penalty, but they also indicate that Teck Cominco is in serious need of deterrence. It has
 2 significantly violated its permit with impunity for almost ten years, setting an example of non-
 3 compliance that cannot help but encourage other industries in Alaska to similarly ignore their permit
 4 limitations.

5 The legislative history of the Clean Water Act reveals that Congress wanted District Courts
 6 to consider the need for retribution and deterrence, in addition to restitution, when they imposed civil
 7 penalties. *Tull*, 481 U.S. at 421; 123 Cong. Rec. 39191 (1977) (remarks of Sen. Muskie citing
 8 Environmental Protection Agency memorandum outlining enforcement policy). To achieve the goal
 9 of deterrence, “the amount of the civil penalty must be high enough to insure that polluters cannot
 10 simply absorb the penalty as a cost of doing business.” *Powell Duffryn*, 720 F. Supp. at 1166.
 11 Additionally, the probability that a penalty will be imposed must be high enough so that polluters
 12 will not choose to risk punishment for non-compliance. *Id.* Over the last 10 years, and despite
 13 repeated Compliance Orders by Consent with EPA in which Teck Cominco promised to achieve
 14 compliance within a year, only to seek yet another COBC, Teck Cominco has trivialized and
 15 ignored the Clean Water Act. Imposing the maximum penalty allowed under the Clean Water Act
 16 will make it perfectly clear to defendants and other similar operations that Clean Water Act
 17 requirements must be followed and that public waterways cannot be sacrificed for private gain.

18 **G. Injunctive relief is appropriate to bring Teck Cominco into compliance.**

19 At trial, plaintiffs will present several proposed forms of injunctive relief that would force
 20 Teck Cominco to comply with its permit limitations. These include the possibility of building
 21 additional treatment facilities at the mine, and/or building a pipeline from the mine to the Chukchi
 22 Sea so that mine effluent is not discharged into the Red Dog Creek in amounts violating Teck
 23 Cominco’s permits. The individual plaintiffs, who lives downstream of Teck Cominco, have
 24 strongly urged the company to voluntarily agree to a pipeline to the ocean, to no avail. Injunctive
 25 relief ordering compliance with its permit limitations through such a pipeline is appropriate here
 26 where all other methods of trying to force Teck Cominco into compliance – numerous COBCs by
 27 state and federal agencies, as well as numerous enforcement suits by those agencies and private
 28 parties over more than a decade – have failed. It is time for Teck Cominco to follow the law, and

1 this Court has the power to make that happen.

2 **VII. CONCLUSION**

3 After six years of preliminaries, Adams is looking forward to proving the remaining 1822
4 claims at trial. Respectfully submitted this 12th day of March, 2008.

5
6 /S/ Luke Cole
7 Luke Cole
8 Attorney for Plaintiffs
9

10 CERTIFICATE OF SERVICE

11 I hereby certify that on the 12th day of March 2008, a true and correct copy of the foregoing Plaintiffs' Trial Brief was served, via
12 electronic mail, on the below identified parties of record:

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